No. 16-1466

In the

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF JASON R. BARCLAY AND JAMES S. MONTANA, JR., FORMER GENERAL COUNSEL TO GOVERNORS OF THE STATE OF ILLINOIS, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DAVID L. APPLEGATE*
WILLIAMS MONTGOMERY & JOHN LTD.
6100 Willis Tower
233 South Wacker Drive
Chicago, IL 60606
(312) 443-3200
dla@willmont.com

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*Counsel of Record

QUESTION PRESENTED

Should the Court overrule *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and declare public sector agency fee arrangements unconstitutional under the First Amendment?

Amici focus on the practical effect of failing to overturn *Abood* on the financial condition of the heavily government-unionized State of Illinois.

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INTEREST OF AMICI CURIAE [1]

Amici are former general counsel to past and present Governors of the State of Illinois. Each of them is knowledgeable and concerned about the connection between the current perilous financial condition of the State of Illinois and the current state of the law with respect to mandatory public union dues and agency fees. Each speaks here in his individual capacity and not as a legal representative of the State of Illinois or any of its agencies or departments, or as a member or representative of any organization or employer with which he may be affiliated.

Jason R. Barclay is former General Counsel to incumbent Illinois Governor Bruce Rauner, having served in that position from 2015 to 2016. As General Counsel to Governor Rauner, Mr. Barclay advised the governor on labor and personnel issues affecting approximately 64,000 state employees and oversaw collective bargaining negotiations with over 30 labor unions representing approximately 93% of those employees. Mr. Barclay also served as Special

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* or their counsel have made such a monetary contribution. Pursuant to Supreme Court Rule 37.3, the parties to this suit have submitted blanket consent to the filing of *amicus curiae* briefs in support of either or neither party, which blanket consent the Clerk of the Court has noted on the docket.

Counsel and Policy Director to former Indiana Governor Mitch Daniels from 2005 to 2006. In 2015, Mr. Barclay was co-counsel with current counsel of record for *amici* Governor Bruce Rauner and certain Kaneland, Illinois, Unified School District # 302 Administrative Support Staff in support of petitioners in the case of *Rebecca Friedrichs, et al, v. Cal. Teachers Ass'n,* 136 S. Ct. 1083 (2016).

James S. Montana, Jr., served as Chief Legal Counsel to former Illinois Governor James Edgar from 1993 to1995. In that role, Mr. Montana advised Governor Edgar on labor and personnel issues affecting state employees and oversaw all significant litigation brought by or against the State of Illinois. As Governor Edgar's Chief Legal Counsel, Mr. Montana drafted or helped draft legislation dealing with state employees, consumer fraud, economic development, public safety, criminal law, business and financial regulation, environmental regulation, and human services. He has also served as Chief Justice of the Illinois Court of Claims, having been originally appointed to that bench by then-Governor Jim Thompson in 1983 and elevated to Chief Justice in 1985. Mr. Montana was an Assistant U. S. Attorney in the Northern District of Illinois for four years.

Each of these former General Counsel to past and present Governors of the State of Illinois is knowledgeable and deeply concerned about the relationship between the current state of the law governing public employee unions and the perilous financial condition of the State of Illinois. Simply put, the lack of any meaningful distinction between public-sector unions' collective bargaining positions

and such unions' legislative and policy aims has helped to lead our nation's fifth most populous state to financial insolvency. *Amici*, having served as the highest ranking legal officers in Illinois's executive branch responsible for negotiating and administering union contracts, hope therefore to share with the Court their knowledge and understanding of the practical effects of this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), as further reasons why the Court should take this opportunity to overturn that case.

INTRODUCTION

The State of Illinois is financially insolvent.

Although States may not, under current U. S. law, seek bankruptcy protection, by any commonly accepted understanding of the term, Illinois meets the definition: its liabilities exceed its revenues and it cannot pay its bills as they come due.

Illinois's current unfunded state and local government retirement debt, for example, is more than $260 billion and rising. Unfunded pension liabilities for state workers alone—for the majority of whom negotiated overtime starts at 37.5 hours per week—makes up half that amount. Nearly 25% of the state's general funds currently go to retirees, many of whom do not live in the State, but all of whom no longer perform any essential services for the State or its citizens because they are retired. Meanwhile, the State owes vendors, including nursing home operators and others who currently provide essential services, nearly $9.5 billion.

At the same time, in the past sixteen years, the State has lost 1.22 million people—the equivalent of the combined populations of the States of Vermont and Wyoming and more than the populations of each the nation's eight least populous states. Despite a constitutional requirement, the State has not had an actual balanced budget since 2001. The most recent round of tax hikes, including a 32% personal income tax rate increase, is projected to raise an additional $4 billion, but already another $1.7 billion operated deficit has appeared. Despite Illinois residents now having the highest state and local tax burden in the country, none of the revenue from these recent tax increases is directed to funding the aforementioned unfunded pension liabilities.

Illinois needs help.

The causes of Illinois's financial woes are long-standing and bipartisan. Yet much of the State's current financial condition results from the conflation of public sector union bargaining and legislative lobbying that this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), continues to facilitate.

Unlike private sector unions, which pit labor against management in meaningful negotiations, public sector unions permit labor and management to sit on the same side of the table. There they purport to bargain with the taxpayers' money. Simultaneously, public sector unions lobby the legislature to support the very same positions they advance at the bargaining table, or even to take away the state's ability to bargain at all when their efforts to achieve their desired outcomes at the

bargaining table fail. The legislature, which values incumbency above all else and fears the possibility of public sector union walkouts, strikes, or civil disturbance, is particularly susceptible to such lobbying. The result is the insolvent State of Illinois.

The Constitutional grounds for overturning *Abood* are well-known to the Court and have been argued before. Twice in the past five years the Court has explicitly questioned its holding in *Abood*. *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). Two terms ago, after hearing oral argument, the Court split 4-4 on whether to over-rule it. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016). *Amici* seek to underscore the practical importance to the State of Illinois of revisiting—and this time overturning—*Abood*.

SUMMARY OF ARGUMENT

Abood is built on the unworkable assumption that public-sector unions' collective bargaining activities are meaningfully distinguishable from those unions' political activities. At least in states like Illinois, that is manifestly not the case. The untenable result is an unsustainable financial condition that only a change in the law can rectify.

In the private sector, this Court has historically upheld agency fees for union workers because private sector political activity is relatively easily separated from labor organizing and administration activities. *E.g., Machinists v. Street*, 367 U. S. 740 (1961); *Railway Employees v. Hanson*, 351 U. S. 225 (1956).

But because in the public sector both labor and management are government employees, both labor and management sit on the same side of the table and bargain with taxpayers' money. Such bargaining inherently affects the political priorities of public spending, making every bargaining decision an act of public policymaking.

In the guise of collective bargaining and member representation, therefore, public sector unions directly impact the amount of taxpayer funds available for necessary public services and profoundly affect the financial solvency of state and local governments. *See* Daniel DiSalvo, *The Trouble with Public Sector Unions*, NATIONAL AFFAIRS, No. 5, p. 15 (Fall 2010); *In re Pension Reform Litigation*, 32 N.E.3d 1, 6 (Ill. 2015) ("For as long as there have been public pension systems in Illinois, there has been tension between the government's responsibility for funding those systems, on the one hand, and the costs of supporting governmental programs and providing governmental services, on the other.").

At the same time, *Abood* infringes on public sector employees' First Amendment political speech rights in the most egregious of ways. First, *Abood* imposes unconstitutional conditions on political speech by allowing the government to condition employment on an employee's financial support for a union's political activities with which the employees may disagree. Second, *Abood* unconstitutionally compels unintended speech by mandating payments to an association that are not a necessary incident to a larger regulatory purpose justifying the required association. Third, *Abood* unconstitutionally imposes viewpoint discrimination by permitting public

employee unions to monopolize public policy debates concerning questions on which those employees may reasonably disagree.

Finally, overturning *Abood* presents no free-rider problem because unions' collective bargaining agreements are often not even in the best interest of many of the public employees within the relevant bargaining unit who could be accused of free-riding if agency fees are eliminated. Such collectively-bargained rules as non-merit based step raises and "bumping" rules, for example, reward tenure over talent and penalize exactly the traits of initiative, innovation, and productivity that taxpayers should encourage in public employees, particularly in cash-strapped states like Illinois.

Relying on unworkable and incorrect factual premises, *Abood*—which the Court questioned from the outset—is defensible no longer. This Court emphasized, in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605–06 (2015), its ability to protect fundamental rights where the executive is unable and the legislature is unwilling to act. In Illinois, that is precisely this case. In *Kimble v. Marvel*, 135 S. Ct. 2401, 2409 (2015), the Court re-emphasized its primacy in overturning the case law that it itself has made. That too is precisely this case. In *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 854–55 (1992), the Court set forth the factors justifying overturning its own precedent. Those factors apply here. The Court should now finish the logical extension of a case arising out of Illinois, *Harris v. Quinn*, 573 U.S. ___ , 134 S. Ct. 2618, 2631–32 (2014), and overrule *Abood*.

ARGUMENT

I. *Abood* Is Built On Unsustainable Assumptions.

As this Court has long recognized, culminating in *Harris*, the purported distinction between political advocacy and collective bargaining is entirely artificial. Yet the core of *Abood*'s four-decade old approach was to attempt to draw a line between union expenditures for collective bargaining, contract administration, and grievance-adjustment purposes, on the one hand, 431 U.S. at 232, and expenditures for political or ideological purposes on the other. *Id.* at 236. But even *Abood* presciently understated that "[t]here will, of course, be difficult problems in drawing lines between collective bargaining . . . and ideological activities." 431 U.S. at 236. That is an understatement. The Illinois experience proves that drawing such lines is not merely difficult but impossible, and that the result is unsustainable.

Contrary to *Abood*'s premise that the two can be distinguished, collective bargaining in the public sector is political lobbying by another name. No more persuasive is the free-rider concern that *Abood* supporters raise. As provisions in Illinois public-sector collective bargaining agreements reveal, unions frequently impose significant costs on exceptional and/or more junior employees, making it more than likely that objecting employees would be better off without the unions' supposedly beneficial speech that these employees are forced to subsidize.

In sum, Illinois is a poster child for why *Abood* should be overruled and all public-sector employees' First Amendment rights should be restored. *Amici* wish to supplement Petitioners' arguments in this

case by illustrating with actual examples from Illinois's history of public-sector collective bargaining why *Abood*'s factual predicates are as unworkable as they are incorrect.

A. Illinois Public Sector Collective Bargaining Is Indistinguishable from Lobbying on Matters of Public Importance.

Abood's attempted distinction between unions' organizing activities and their political activities is nowhere more unworkable than in the State of Illinois. The State is besieged by intractable budgetary problems, with the General Assembly annually inviting the State to spend more than its actual or projected revenues.[2] The budgetary problem is exacerbated by long-term financial issues, stemming in large part from the State's unfunded pension liability, which now exceeds $129 billion.[3] A quarter of the budget is now devoted to paying down that unfathomable pension liability. *See* First Am. Complaint, *Bruce Rauner, Governor of the State of Illinois, v. American Federation of State, County, and Municipal Employees Council 31, AFL-CIO, et al.*, Case: 1:15-cv-01235, U.S.D.C., N.D.IL, Filed: 02/09/15, Joint Appx. at 78, ¶ 70. The future does

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[2] Illinois has not had a truly balanced budget since 2001. See Dabrowski,Ted, and Klingner, John, The history of Illinois' fiscal crisis, at https://www.illinoispolicy.org/reports/the-history-of-illinois-fiscal-crisis/#part2.

[3] Special Pension Brief, State Commission on Government Forecasting and Accountability, November 2016, at http://cgfa.ilga.gov/Upload/1116%20SPECIAL%20PENSION%20BRIEFING.pdf.

not look bright either, as legislators must cut essential services to afford employee salaries and benefits that are among the most expensive in the country.[4]

Over 93% of the Illinois state government workforce is currently unionized. Joint Appx. at 75, ¶ 57. Despite strong peer pressure, recent data indicate that roughly 6,500 workers—or one of seven of the approximately 46,000 Illinois State employees covered by collective bargaining agreements that report to the Governor—have chosen not to join the union. *Id.* at 77, ¶ 65. Yet those same objecting employees are forced to fund the unions' activities through so-called "fair share" contributions. ¶¶ 56. As with income taxes, "fair" is typically a code word for using the power of government to force other people—in this case the taxpayers of Illinois—to pay money or benefits to those demanding it.

The Illinois Department of Central Management Services ("CMS") is the agency charged with negotiating with public sector unions that represent employees that report to the Governor, and is therefore within the knowledge and expertise of *amici*. Over time, CMS has entered into numerous collective bargaining agreements with multiple unions. *See, e.g.*, AFSCME Master Contract 2012-

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[4] Andrew J. Biggs & Jason Richwine, *Overpaid or Underpaid? A State-by-State Ranking of Public-Employee Compensation American Enterprise Institute for Public Policy Research*, AMERICAN ENTERPRISE INSTITUTE, April 2014, *available at* https://www.aei.org/publication/overpaid-or-underpaid-a-state-by-state-ranking-of-public-employee-compensation/.

2015, *available at* http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf.

Although bargaining has not always been easy, Illinois government management and labor have had a "long and largely uneventful bargaining history." *State of Illinois, Department of Central Management Services, and American Federation of States, County, and Municipal Employees, Council 31*, Case Nos. S-CB-16-017 and S-CA-18-087, "Decision and Order of the Illinois Labor Relations Board State Panel, Sept. 6, 2016, at 150. Since 1975, for example, the parties have always reached agreement on successor collective bargaining agreements. *Id.* That is largely because management bargains with the taxpayers' money and management's incentive is to get re-elected in a State in which unions carry heavy clout and make significant contributions to the political leaders to whom the individuals negotiating these contracts report.

In Illinois, the Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. 315/6, governs collective bargaining between government employers and unions representing public employees. Section 6 permits a collective bargaining agreement to require covered employees "who are not members of the organization" to pay "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment," a so-called "fair share" or agency fee. *Id.* at 315/6(e).

Recent Illinois public union labor agreements require the State automatically to deduct those "fair share" fees from nonmembers' paychecks and to pay them directly to the unions. *See* Collective

Bargaining Agreement between CMS and AFSCME Council 31 effective from June 30, 2012 to June 30, 2015, Dist. Ct. Docket 154-1, ("AFSCME Master Contract 2012-2015"), Joint Appx. at 114, Art. IV, Sec. 3. Despite Illinois's precarious financial condition, the public-sector union mantra universally remains "we don't give back," meaning that, in the unions' view even a one-time concession is likely to become permanent. In the most recent CMS contract negotiations, for example, AFSCME has sought to continue this practice of automatic deductions of "fair share" payments. *See State of Illinois, Department of Central Management Services, supra.*

By statute, nonmembers' "fair share" fees may not exceed the dues required of members. See 5 ILL. COMP. STAT. 315/6(e). Yet Illinois public-sector unions frequently come as close as they can get, with state employee unions collecting "fair share" fees ranging from 79% to 100% of members' dues. *See* Joint Appx. at 76-77, ¶¶ 60-64. In Illinois, in other words, little meaningful financial distinction exists between joining and not joining a public-sector union—in either case, the employee pays virtually the same amount per paycheck to the union.

Illinois public-sector unions also do not account to either nonmembers or to the State—i.e., their employer—how they calculate or spend their so-called "fair share" fees. *Id.* ¶¶ 57–61. Yet the largest state employee union in Illinois, the American Federation of State, County, and Municipal Employees Council 31 ("AFSCME"), freely admits that it uses so-called "fair share" fees for more than simply securing workplace protections and better employee compensation for its members. In its required disclosures, for example, AFSCME

acknowledges that, among other activities, it uses its so-called "fair share" fees for "lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement," "supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the fair share payer's employment," "lobbying for purposes other than the negotiation, ratification, or implementation of a collective bargaining agreement," "[s]upporting and contributing to political organizations and candidates for public office," "[s]upporting and contributing to ideological causes," and "[t]he public advertising of AFSCME's position on issues other than the negotiation, ratification, or implementation of a collective bargaining agreement." First Am. Complaint, *Rauner v. AFSCME Council 31,* Joint Appx. at 76, ¶ 59; AFSCME Master Contract 2012-2015, Joint Appx. at 337-340, ¶¶ 6, 18, 22, 28, 29, 31.

Even those union activities nominally confined to collective bargaining, however, have significant political implications because they go to the heart and soul of the Illinois state budget. Enriched by funds extracted from members and nonmembers alike, public-sector unions in Illinois have negotiated wages and benefits that are out of line with the Illinois economy in general and the private sector in particular. They are, as a result, simply no longer sustainable.

Between 2004 and 2015, for example, Illinois public union employee wages increased approximately 80%. First Am. Complaint, *Rauner v. AFSCME Council 31,* Joint Appx. at 77, ¶ 66. Yet same-time inflation was only 26%, and comparable private sector salary increases were only 31%. *Id.* As

another example, unionized Illinois government employees who average $38,979 annual salary over a 26-year career currently contribute slightly over one year's salary—approximately $40,539—to the State's pension system, but over a twenty-year retirement can receive twenty times that amount: $821,588 in pension payments, on which they pay no state income tax, plus retiree health care. *Id.* ¶ 69. Even assuming a reasonable internal rate of return on the employee's contribution, Illinois taxpayers—many of whom receive no pensions of their own—must fund the bulk of these payments out of general revenues. *See id.*, ¶ 68. These massive wealth transfers from the private sector to the public sector raise inherently political public policy debates that the collective bargaining process effectively pre-empts under *Abood*.

These generous public-sector union benefits have also contributed to a staggering structural budget deficit and to repeated Illinois credit rating downgrades. *Id.* In fiscal year 2015, for example, pension costs attributable to the general fund exceeded $7.5 billion, or about 24% of state-source general fund revenue. *Id.*, ¶ 70. The overall unfunded liability of the State's pension systems that year exceeded $111 billion. *Id.* This is unsustainable in a state in which the annual projected general fund revenue is approximately $ 36 billion. *See* State of Illinois Budget Summary, available at http://cgfa.ilga.gov/Upload/FY2018BudgetSummary.pdf.

Equally important are the topics on which public-sector employee unions force the State to bargain, because they expose the hollowness of the purported "free rider" problem. Illinois public-sector

unions have successfully bargained, for example, for "bumping" rights, which mean that, during layoffs inherent in facility closures, a more senior union employee can force a more junior colleague to "bump down" in rank or out of a job altogether. *See, e.g.*, AFSCME Master Contract, Joint Appx. at 255, Art. XX Sec. 3. Similarly, by contract, more junior workers cannot be promoted over their more senior union colleagues in Illinois even if they have better evaluations or higher performance, nor can they be rewarded financially for that higher performance. In sum, even the collective bargaining aspect of the union's activities selectively benefit some members to the detriment of others. And non-union employees are forced to contribute to efforts to maintain a system with which on a policy level they may seriously disagree.

Consider, for example, the pension provision in the collective bargaining agreement ("CBA") between the Executive Branch and AFSCME, which represents the most state employees. The CBA that expired June 30, 2015, and is currently subject to contentious litigation states that employees enjoy pension rights statutorily provided in the Illinois Pension Code. AFSCME Master Contract, Art XIII Sec. 3. But pensions in Illinois are severely underfunded, with the State carrying on its books over $100 billion in underfunded pension obligations.

No doubt concerned that the legislature will look for ways to curtail pension benefits in order to deal with the State's massive fiscal problem, AFSCME proposed as part of the current collective bargaining that the Executive Branch join AFSCME in lobbying for a mechanism for pension fund boards to compel payment of pension contributions by the

State. Although the Illinois Constitution purports to guarantee pension benefits, it does not guarantee the funding of such benefits, and no such mechanism currently exists. *See In re Pension Reform Litigation*, 32 N.E.3d at 8. If the State is unable to make the required payment, then the pension funds will not receive that payment.

It should go without saying that this is an issue of extreme public importance in the State of Illinois, both to state employees and to taxpaying citizens: a classic subject of public policy debate. Under the guise of collective bargaining, however, AFSCME has in the past demanded that the Executive Branch join AFSCME in advocating for legislation to ensure that pension contributions are made without regard to the State's health, educational, and other priorities. Regardless of the merits of AFSCME's position, this is highly political speech on which the citizens of the State of Illinois, including other union employees who are in less lucrative pension plans, may fairly disagree. Yet on this issue AFSCME's speech, and AFSCME's speech alone, is subsidized by non-members' "fair share" dollars.

In a similar vein is AFSCME's most recent proposal to address the State's fiscal environment. The issue began in September, 2015 when the General Assembly, in violation of the Illinois Constitution, submitted an unbalanced budget to Governor Rauner, committing the State to spend upwards of $36 billion against projected revenue, at that time, of $32 billion and forcing a gubernatorial veto.

Recognizing that its ability to negotiate economic benefits during collective bargaining

depends on the State's ability to afford them, AFSCME proposed an addition to the CBA entitled "Meeting Illinois' Revenue Needs." The provision reads, in part: "The Union and the Employer agree that our state budget cannot be balanced with existing revenue. . . . Illinois, however, can meet its revenue challenge with measures that address the state's long-term structural deficit and ensure corporations pay their fair share." A corporation is a legal fiction, of course, and any money it pays in taxes must from come from individuals: owners, customers, and creditors. Making corporations pay their "fair share," like the designation of compulsory charges to non-union members as "fair share" payments itself, is simply a code phrase, in this case for raising corporate taxes. But raising corporate taxes is something Illinois can ill afford unless it wishes to drive further business away from Illinois and to neighboring states. Most significant, although non-member employees may reasonably disagree on the matter of corporate taxation, they nonetheless are required to contribute to the union's political efforts to secure an increase in corporate taxation.

As if that were not enough to show that Illinois public-sector union collective bargaining is political and ideological, AFSCME's proposal continued: "Before any layoffs or service cuts are considered, the parties agree to work jointly to modernize Illinois' tax system and rein in financial fees based on" several principles geared at producing "a fair tax system in Illinois" and holding financial institutions "accountable for unethical and questionable practices." But whether it is "fair" to tax a dollar differently based on who earns it or how is at the

heart of political debate in the republican form of government that the U. S. Constitution guarantees to every State. U.S. Const., Art. IV, Sec. 4. It is also not the place of labor contract negotiators to attempt to regulate financial institutions. Whether right or wrong on the merits, however, the proposal was again inherently political and ideological, inextricably tied to at least one of the most pressing issues of public concern in Illinois, and solely the province of the General Assembly and the Governor. Yet here, too, AFSCME's highly political speech was subsidized by "fair share" dollars.

That 2015 collective bargaining session was the norm, not an outlier. AFSCME and other unions frequently posit as a matter of collective bargaining that the State of Illinois can maintain or increase wages, benefits, and other typical terms of collective bargaining agreements simply by raising taxes on Illinois's already increasingly overtaxed citizens. During the round of negotiations ending in 2013, for example, then-AFSCME Executive Director Henry Bayer argued it unnecessary for the State to limit benefits to public employees because the State could purportedly simply increase taxes to compensate public employees. In 2011, Terry Reed of the Illinois Federation of Public Employees, Local 4408, IFT/AFT ("IFPE") took the same position at the bargaining table while AFSCME and IFPE simultaneously lobbied the legislature for a tax increase. Again, reasonable (even unreasonable) Illinoisans may disagree on whether it is sound public policy repeatedly to raise taxes on a dwindling state population, but that is an inherently political topic on which the government may not

constitutionally compel or silence speech of those who do not support public-sector unions' position.

Another telling Illinois example proving that *Abood*'s fictional line between collective bargaining and political activity is illusory was AFSCME's 2015 effort to avoid collective bargaining with the Governor's office entirely. In May 2015, supported by AFSCME, the Illinois General Assembly passed Senate Bill 1229 to allow unions negotiating with the State of Illinois to demand arbitration instead of negotiating with the Governor. *Available at* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1229&GAID=13&DocTypeID=SB&SessionID=88&GA=99. While first strongly urging Governor Rauner to sign the bill and, following the Governor's July 29, 2015, veto, then arguing for an override, AFSCME's chief spokesperson opened several bargaining table sessions by vigorously advocating in favor of Senate Bill 1229.

AFSCME tried this same tactic again in 2016. AFSCME vocally supported the Legislature's passing HB 580, which was nearly identical to SB 1229, to strip the Governor of his ability to negotiate union contracts if a union disagreed with the position he took at the bargaining table. AFSCME again failed to convince the Illinois Legislature to override the Governor's veto of HB 580, but nonetheless continued to commingle its legislative agenda with its collective bargaining positions.

Using non-members' "fair share" dollars, among others, in other words, AFSCME lobbied the Governor's representatives to support legislation on which AFSCME has already lobbied the legislature

and the subject of which was and is inherently political.

Other examples abound. While negotiating the 2000-2004 Collective Bargaining Agreement, for example, AFSCME first bargained for and obtained "the Rule of 85," under which an employee whose combined age and years of service adds up to 85 can retire without penalty. AFSCME then successfully lobbied the legislature to enact that change into law. *See* 40 ILL. COMP. STAT. 5/14-107; 40 ILL. COMP. STAT. 5/14-110(a)(i), (ii). For yet another example, on December 17, 2013, AFSCME collectively bargained for a memorandum of understanding to oppose legislative efforts to award additional work to a State subcontractor called Maximus. Independent of the merits, this, too, was purely political.

Again, these are public policy positions that reasonable people, including labor union members and representatives, may support (or oppose). But they are not positions on which unions may constitutionally coerce non-members to speak or to stay silent. Yet in Illinois, at least, this is exactly what AFSCME often does by relying on non-members' "fair share" dollars to bargain for an agreement while simultaneously seeking or opposing legislation.

Far from being unique, these examples merely illustrate the impossibility of separating public-sector collective bargaining from other political activity of public-sector unions. Simply put, public employee unions in the United States are *sui generis*. As such, "decision-making by a public employer is above all a political process" undertaken by people "ultimately responsible to the electorate."

Abood, 431 U.S. at 228; *see Harris*, 134 S. Ct. 2631–32 (2014); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015) ("[T]he Legislature' did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people."), *citing Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *cf. Smiley v. Holm*, 285 U.S. 355, 365 (1932) (holding that Minnesota's legislative authority includes not just the two houses of the legislature but also the Governor's veto power).

Not surprisingly, then, AFSCME's collective bargaining in Illinois has proven quite successful in obtaining concessions that Illinois taxpayers cannot sustain. Under single-party rule over the last decade, AFSCME has received 27 separate pay increases. In recent negotiations AFSCME has demanded salary increases of between 11.5% and 29% (for certain positions when seniority is considered) over four years. Combined with AFSCME's other requests regarding wages and health insurance, these proposals are estimated to cost the State an additional $2.1-2.5 billion over the course of a four-year contract—on top of the current budget deficit of over $4 billion. Absent increasing Illinois taxes, AFSCME's proposals are quite simply unsustainable. But raising taxes is inherently the province of the legislature, not the subject of collective bargaining between the governor's office and public-sector employee unions.

Because the process is both impractical and unsustainable, public sector unions should no longer be allowed to lobby for preferred outcomes with the money they receive from nonmembers. The Court should overturn *Abood*.

B. The Facts Do Not Favor the Free-Riding Rationale for *Abood*.

Belying the free-rider rationale often used to justify *Abood*, public-sector employee unions' collective bargaining agreements are often not even in the best interest of all public employees within the relevant bargaining unit. Take, for example, AFSCME's 2012-2015 Illinois Collective Bargaining Agreement, which often ties employment decisions and conditions of employment to seniority rather than merit. A less senior but higher-performing non-member, such as the Petitioner Mark Janus, would be far better off without the union's "speech," which agency or "fair share" fees nonetheless force non-members to subsidize.

More specifically, Article VIII, Section 2(b) of the Illinois AFSCME agreement states that, "in cases of promotion, layoffs, transfers, shift and job assignments, seniority shall prevail unless a less senior employee has demonstrably superior skill and ability to perform the work required in the position classification." The training manual for the labor relations arm of the Illinois Department of Central Management Services—the agency that administers collective bargaining agreements with the State—in turn instructs that "demonstrably superior" means that the less senior employee must be "head and shoulders above" the more senior employee. Proving that such a subjective standard among colleagues in the same bargaining unit is both unenviable and difficult, particularly in a union world in which a decision invariably leads to a multi-step grievance process. Not surprisingly, in *amici*'s experience, the

State of Illinois, within the bargaining unit, has almost never appointed less senior but more qualified employees to positions over employees with more seniority despite the repeated desire by department directors to do so. A less senior but more capable employee, like Janus, is manifestly not "free riding" on AFSCME's collective bargaining efforts. To force that person through "fair share" fees to support collective bargaining contrary to her own interests is both offensive and wrong.

Unsurprisingly, AFSCME's persistence in protecting more senior members at the expense of more junior but more capable employees extends well beyond job assignments and extends to vacations, holidays, overtime, vacancies, shifts, promotions, staff reductions, and layoffs:

- "Where the Employer is unable to grant and schedule vacation preferences for all employees within a position classification within a facility but is able to grant some of such (one or more) employees such vacation preferences, employees within the position classification shall be granted such preferred vacation period on the basis of seniority." Art. X, Sec. 6.
- "Where some but not all employees are scheduled to work a holiday, the scheduling shall be offered on a seniority rotation basis." Art. XI, Sec. 11.
- Overtime "shall be distributed on a rotating basis among such employees in accordance with seniority." Art. XII, Secs. 3(e), 4(e), and 5(e).

- "When a job assignment vacancy is posted and more than one employee within the position classification requests such an assignment, consideration shall be given to the employee with the most seniority in the same position classification posted." Art. XIX, Sec. 3(A).
- When permanent shift assignments are made, employees may exercise seniority to retain their shift assignments. Art. XIX, Secs. 4(A)(1) and B(2).
- A displaced employee may exercise seniority to bump a junior employee on a shift of his preference. Art. XIX, Secs. 4(B)(5) and 4(C).
- Selection for promotion or voluntary reduction shall be based on seniority. Art. XIX, Secs. 5(A)(4) and (B)(5).
- Layoffs shall be conducted in reverse order of seniority, starting with the most junior employee. Art. XX, Sec. 2.

These non-exclusive examples amply demonstrate that the purported "free rider" problem is not a problem at all, but merely examples of public-sector unions using a portion of non-member's compensation to favor union members. The practice is offensive to employees, inefficient and counterproductive for taxpayers, and hardly a reason to sustain *Abood*, particularly where fundamental First Amendment freedoms are at stake. Many employees may well be better off without union representation. The law should respect those employees' choice to opt out of membership and not force them nonetheless to subsidize union speech or

their inherently political actions at the bargaining table.

II. *Abood* On Its Face Conflicts With Core First Amendment Principles.

The unsustainable symbiotic relationship between government employee unions and the legislature deprives the people in general, and non-union employees in particular, of their proper voice in representative government while violating fundamental First Amendment freedoms of speech and association.

Among the laws that properly restrict the activities of public sector unions is the U.S. Constitution, in particular the First Amendment. As this Court held in *Perry v. Sinderman*, 408 U.S. 593, 597 (1972), government employers therefore "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech."

Because public sector collective bargaining by its nature influences governmental policy, this Court has been quite clear that such bargaining necessarily involves political speech in a way that private sector collective bargaining does not. *Harris* at 2631–32; *Abood*, 431 U.S. at 231; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968).

Such core political speech, moreover, is at the top of the "rough hierarchy in the constitutional protection of speech" that this Court has come to recognize. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *see also Snyder v. Phelps*, 562 U.S. 443 (2011) (acknowledging the "hierarchy of First Amendment values"); Paul B.

Stephan III, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 206 (1982) ("The approach reflected in the Court's free speech opinions, and in almost every scholarly discussion of the first amendment, posits some hierarchy of values entitled to constitutional protection. Such a hierarchy implies a . . . ranking of particular categories of expression, according to the degree the expression implicates the underlying values."). As a result, public employment cannot constitutionally be conditioned on subsidizing political speech any more than public employment can be conditioned on paying for lobbying for (or against) particular legislation.

The distinction that *Abood* vainly attempts to impose between collective bargaining, contract administration, and grievance-adjustment purposes on the one hand, 431 U.S. at 232, and expenditures for political or ideological purposes on the other, 431 U.S. at 236, is in practice entirely artificial and unworkable. It not only imposes unconstitutional conditions on employees' speech but also compels subsidized unintended speech and imposes viewpoint discrimination. Under the factors set forth in *Casey*, 505 U.S. at 854–55 (1992), this triple threat to the First Amendment mandates overturning *Abood*

A. *Abood* Imposes Unconstitutional Conditions on Political Speech.

This Court has long rejected "the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996); *see also, Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v.*

Umbehr, 518 U.S. 668, 673 (1996) (collecting cases). So, for example, public employers can neither require membership in any particular political party, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), nor bar from public employment members of even, say, the Communist Party. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609–10 (1967).

By allowing government to condition employment on support for a union's political activities, *Abood* conflicts irreconcilably with both *Elrod* and *Keyishian*, as even concurring Justices in *Abood* agreed. *See Abood*, 431 U.S. at 243–44 (Rehnquist, J., concurring) ("I am unable to see a constitutional distinction between a government-imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."); *id.* at 260 n. 14 (Powell, J.,) ("I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of greater deference, when challenged on First Amendment grounds, than its decision to adhere to the tradition of public patronage.").

As this Court has also long recognized, the First Amendment's "freedom of speech" necessarily comprises the decision of "both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988); *see also, Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). In *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968), therefore, the Court held that the First Amendment prohibits firing a public school teacher for criticizing a school district's efforts to raise

revenues. Under *Abood* this Court therefore could not constitutionally compel teachers to speak on those same topics. Yet that is exactly what the currently-permitted public employer "agency shop" not only condones but compels, especially as agency fees approach the amount of union dues.

B. *Abood* Unconstitutionally Compels Unintended Speech.

Drawing on *United States v. United Foods*, 533 U.S. 405 (2001), this Court made clear in *Knox v. Serv. Emps. Int'l Union*, 567 U.S. __ , 132 S. Ct. 2277, 2289 (2012), that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny. First, there must be "a comprehensive regulatory scheme involving a 'mandated association' among those ... required to pay the subsidy." *Id.* (quoting *United Foods*, 533 U.S. at 414). Second, compulsory fees may be levied "only insofar as they are a 'necessary incident' of the larger regulatory purpose which justified the required association." *Id.*

In *United Foods*, this Court therefore invalidated assessments imposed by a Department of Agriculture "Mushroom Council," which Congress had established ostensibly to promote the mushroom industry. The Council funded its programs with mandatory assessments on those who handled fresh mushrooms, which assessments then funded generic advertising promoting mushroom sales. 533 U.S. at 412. Respondent objected to the mandatory fee because it wished to promote its own brand of mushrooms as superior to those of other producers. *Id.* at 411. This Court held that the mushroom fee

did not meet *United Foods'* two conditions above and therefore invalidated the fee.

Abood, however, stands *United Foods* on its head. First, compelling payments to public-employee unions is not a "necessary incident" to a mandated association for non-speech reasons. The very purpose of the agency fees is to fund the union's advocacy. Thus, government compels those payments expressly to support union speech in collective bargaining. *Abood* therefore conflicts with the Court's historical refusal to uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415.

Second, *Abood* inverts the level of constitutional protections otherwise provided for commercial speech on the one hand, and purely political speech on the other. This Court has consistently held that commercial speech merits less protection than core political speech, which is at the heart of the First Amendment. *E.g., R.A.V.*, 505 U.S. at 422 (1992) (Stevens, J., concurring) ("Core political speech occupies the highest, most protected position" in the First Amendment hierarchy). *United Foods* obviously involved purely "commercial speech" – the promotion of mushroom sales. On First Amendment grounds, *United Foods* correctly invalidated compelled commercial speech requirements, yet *Abood* continues to sanction compelled political speech. *Abood*'s holding is therefore both anomalous and contrary to *Knox* and *United Foods*.

Third, unlike unwilling public employee union members, dissenting mushroom producers in *United Foods* remained free to run competing ads touting

their own brands of mushrooms. By its very nature, union labor law provides for an exclusive bargaining unit. If *Abood* is left standing, non-union public employees have no other outlet than the union they do not wish to join to vindicate their views, which they are required to subsidize to foster political views inconsistent with theirs.

Such employees, therefore, cannot meaningfully engage in speech that counters the union message in dealing with their employer, the people of the State of Illinois. This coerced combination of forced silence and forced subsidization of unwanted speech renders *Abood* unconstitutional under the First Amendment.

C. *Abood* Unconstitutionally Imposes Viewpoint Discrimination.

Finally, *Abood* on its face imposes the most "egregious" form of First Amendment regulation – clear-cut viewpoint discrimination. *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

Abood itself recognized that public employees "may very well have ideological objections to a wide variety of activities undertaken by the union," and may "believe[] that a union representing [them] is urging a course that is unwise as a matter of public policy." 431 U.S. at 230. Yet *Abood*, as it stands, nevertheless permits states like Illinois to promote unions' messages by compelling employees to support those unions and their message.

Under this Court's own precedents, such state-mandated support for union speech is indisputably viewpoint discrimination. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of*

Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n, 429 U.S. 167, 175–76 (1976); *see also Rosenberger*, 515 U.S. at 831–32 (viewpoint discrimination occurs when a speech regulation "skew[s] . . . [a public] debate" in favor of one party or another). By sanctioning agency-shop laws, however, that is precisely what *Abood* not only permits, but also compels. The Court should overturn it.

CONCLUSION

Because it facilitates the financial destruction of states like Illinois while violating employee rights in three different ways, *amici* Jason R. Barclay, and James S. Montana, Jr., respectfully but strongly urge the Court to overturn *Abood*.

Respectfully submitted,

DAVID L. APPLEGATE*
WILLIAMS MONTGOMERY & JOHN LTD.
6100 Willis Tower
233 South Wacker Drive
Chicago, IL 60606
(312) 443-3200
dla@willmont.com

Counsel for Amici Jason Barclay and James S. Montana, Jr., former General Counsel to Governors of the State of Illinois

Counsel for Amici Curiae

December 6, 2017 *Counsel of Record